OAH 7-1800-20742-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal of Rule 36 Limited Partnership of Duluth

RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY DISPOSITION AND PARTIAL SUMMARY DISPOSITION

The above-entitled matter came before Administrative Law Judge (ALJ) Richard C. Luis on Cross-Motions for Summary Disposition and Partial Summary Disposition. Rule 36 Limited Partnership of Duluth (Appellant, Rule 36 Duluth) filed its Motion for Summary Disposition on March 10, 2010. The Department of Human Services (DHS or Department) filed its Response and its Motion of Partial Summary Disposition on April 1, 2010. Oral argument on the Motions was heard on May 3, 2010, and the OAH record with respect to the Motions closed on that date.

Samuel D. Orbovich, Esq., appeared on behalf of Appellant Rule 36 Duluth.

Barry R. Greller, Assistant Attorney General, appeared on behalf of the DHS.

Based on the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that:

1. Appellant Rule 36 Duluth's Motion for Summary Disposition be **GRANTED** and that the $695,747 disallowance be **REVERSED**.
2. The DHS's Motion for Partial Summary Disposition be **DENIED**.

Dated: June 1, 2010

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

NOTICE

This Recommended Ruling is not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommended Order Granting Appellant's Motion for Summary Disposition. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Cal Ludeman, Commissioner, Department of Human Services, P.O. Box 64998, St. Paul, MN 55164-0998, 651-296-2701 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Recommended Ruling will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Recommended Ruling and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Rule 36 Duluth appeals from a notice of agency action issued by the Commissioner of Human Services (Commissioner) pursuant to Minnesota Statutes §§ 256B.04, subd. 10, 256B.0622 and 256B.0624 (2008). The Commissioner's notice of agency action determined that DHS was entitled to recover Medical Assistance payments for mental health care services totaling $695,747. This sum was earlier paid to Rule 36 Duluth under Intensive Rehabilitation Treatment Services (IRTS) program rates for calendar year 2006. DHS sought monetary recovery based on what it deemed to be "settle-up rates" determined after a DHS audit of Rule 36 Duluth's actual costs. Rule 36 Duluth challenges the DHS's authority to retroactively reduce its IRTS 2006 rates. Rule 36 Duluth maintains that the governing statue does not authorize such action. It further contends that the DHS rate-setting guidelines and procedures, which detailed criteria for retroactive rate adjustments, are invalid unpromulgated rules. Rule 36 Duluth has moved for summary disposition and requests an order recommending that the $695,747 disallowance be reversed on the grounds that DHS lacks authority to adjust IRTS payment rates retroactively.

The Department opposes Rule 36 Duluth's motion and has itself moved for partial summary disposition. The Department requests that the ALJ find that the Commissioner was authorized to establish "settle-up rates" to replace "interim

rates" under express provisions in the contracts the host counties had with Rule 36 Duluth. The Department urges the ALJ to set this matter on for an evidentiary hearing.

Uncontroverted Material Facts[1]

Rule 36 Duluth is an IRTS facility. IRTS facilities are designed to provide short-term, rehabilitative services for individuals who have serious mental illnesses and who, based on medical need, require 24-hour residential care. Prior to 2004, residential mental health care services were provided through a state-funded program governed by Minn. R. 9520.0500 to 9250.0690.[2] Under this program, counties purchased mental health services from providers by entering into service contracts. The contracts would memorialize the daily payment rates negotiated between the county and provider. DHS paid the negotiated rates and did not treat the rates as conditional or interim. In addition, the rates were not subject to retroactive settle-up procedures following a review of allowable costs.[3]

Beginning in 2004, the state-run program was converted to a Medicaid funded program known as IRTS under Minn. Stat. § 256B.0622. The IRTS program provides more intensive, short-term services during stays that typically do not exceed 90 days.[4] Like the previous program, counties have the primary responsibility for providing or contracting for the provision of IRTS services. The state, through the Commissioner and DHS, has responsibility for reviewing and approving the negotiated rates of payment.[5] Under the IRTS statute, counties recommend one daily rate per provider after considering and documenting six criteria, including the "actual costs incurred" by providers.[6] The Commissioner is required to approve or reject the county's rate recommendation based on the Commissioner's own analysis of the same six criteria.[7]

As enacted, the statute contains no reference to "interim" or "settle-up" rate-setting.[8] During 2003 and 2004, John A. Anderson, a supervisor in the Adult Mental Health Division of DHS, convened a series of stakeholder meetings with county personnel and providers to discuss how DHS planned to define and implement the new IRTS program.[9] Mr. Anderson was responsible for reviewing rates proposed by counties and IRTS providers. He was also the principal

[1] The following recitation of facts are uncontroverted for purposes of this motion only.
[2] The program was known as "Rule 36."
[3] J. Anderon Dep. at 20-21.
[4] J. Anderson Dep. at 13-14; J. Anderson Aff. at ¶ 9. (In the past, individuals would live in residential programs for an average of nine months to a year, with some staying as long as four years.)
[5] Minn. Stat. § 256B.0622, subd. 8 (2006).
[6] Minn. Stat. § 256B.0622, subd. 8(c) (2006).
[7] Minn. Stat. § 256B.0622, subd. 8(g) (2006).
[8] Minn. Stat. § 256B.0622, subd. 8 (2006).
[9] J. Anderson Dep. at 63-72; Dep. Exs. 7-11.

drafter of the rate-setting procedures used by the Department.[10] The agenda for these stakeholder meetings did not include explanations or discussions regarding retroactive settle-up rates or the rate-setting criteria that was subsequently employed by DHS.[11] Following the conclusion of the stakeholder meetings, DHS produced a document detailing the programmatic implementation criteria for the IRTS program.[12] Nothing in that document discussed rate-setting or suggested a variance from the former program's procedure of paying providers based upon fixed rates that had been negotiated earlier with the counties.[13]

Around September of 2006, Mr. Anderson began drafting and issuing rate-setting guidelines that he sent to the counties, accompanied by an instructional mandate that the rate-setting provisions be incorporated into the contracts counties entered into with IRTS providers.[14] The guidelines included audit criteria and "settle-up" rate-setting procedures.[15] Some versions of the guidelines stated explicitly that the rates negotiated by the counties and providers and approved by DHS were "regarded as conditional." For example, the 2007 IRTS Rate Setting Instructions stated, in relevant part:

> The rates for ACT and IRTS services are regarded as conditional. They are based upon the budgets approved by the county and the Department of Human Services. The Department of Human Services may adjust the rate of a given program based upon the actual expenditures and the actual utilization by the vendor. In the event that the vendor generates revenues beyond their actual approved expenditures, the vendor is expected to repay the excess earnings within ninety days of being requested to do so.[16]

Some versions of the guidelines referenced the federal Single Audit Act, notwithstanding the fact that this Act does not apply to private IRTS providers.[17] Still other guidelines referenced federal procurement regulations governing federal agencies.[18] In addition, later versions of the guidelines included a disclaimer that DHS did not intend the instructions to constitute "new regulations or to promulgate rules."[19]

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[10] J. Anderson Dep. at 66-72; Dep. Exs. 8-11; J. Anderson Aff. at ¶ 3.
[11] *Id*. (The agenda items focused primarily on policy and procedures relating to services, staffing ratios, and admission and discharge).
[12] J. Anderson Dep. at 63-64; Dep. Ex. 13. (The document is entitled "Variance for Intensive Residential Treatment and Crisis Stabilization Programs Licensed Under Minnesota Rules 9520.0500 to 9520.0690" and is referred to as the "Variance" by the Department.)
[13] J. Anderson Dep. at 92-93; Dep. Ex. 13.
[14] J. Anderson Dep. at 100-101, 107-108, 147-149, and 157-158; Dep. Exs. 22, 25-29, and 31. *See also*, DHS Memorandum at 23-24.
[15] *Id*.
[16] J. Anderson Dep. Ex. 25.
[17] R. Gutz Dep. at 15-16.
[18] J. Anderson Dep. at 105-106; Dep. Ex. 21.
[19] *See, e.g.,* Ex. 26.

Many counties responded to the guidelines by putting provisions in their contracts with IRTS providers stating that program rates are subject to audit and retroactive change based on a review of the actual costs incurred by the facility in providing services.[20] DHS relied on these contract provisions to implement its rate-setting guidelines to recoup overpayments from IRTS providers.

During 2006, Rule 36 Duluth owned and operated six IRTS homes. After negotiating rates, which were reviewed and approved by the Commissioner, Rule 36 Duluth entered into written contracts with the counties or groups of counties served by its facilities.[21] In all but one of the contracts, it is expressly stated that the Commissioner-approved IRTS rates are subject to "retroactive change" based on a "review" or "audit" of the actual costs or expenses incurred by the Rule 36 Duluth facility in providing services.[22] For example, the 2006 contract for Rule 36 Duluth's Camden House IRTS facility with the Southwestern Minnesota Adult Health Consortium, a group of eighteen Minnesota counties, addresses the possibility of "overpayments" and the recovery of overpayments by the counties and DHS. The contract states in relevant part:

> The program rate is based on the approved expenditures budget. The Contractor's actual expenditures are subject to review by the Consortium and the State. If it is determined that the Contractor did not incur expenses consistent with the approved budget, *the program rate may be adjusted retroactively to reflect actual expenditures*.[23]

Jeff Bradley is the Business Operations Manager for Rule 36 Duluth. Sometime in 2007, Mr. Anderson of DHS told Mr. Bradley that Rule 36 Duluth would have to engage a certified public accountant to audit its 2006 IRTS programs and supply the audit to DHS. The audit results would assist DHS in determining whether Rule 36 Duluth was appropriately allocating its central office costs to its six IRTS homes.[24] However, the CPA regularly engaged by Rule 36 Duluth to compile its quarterly financial statements could not find an auditor willing to undertake a certified audit for the contractually fixed fee of $10,000.[25] In the end, at the suggestion of DHS, Rule 36 Duluth engaged David Ehrhardt, the director of the DHS Internal Audit Division, to conduct the audit.

The report generated by the DHS Internal Audit Division looked behind all costs incurred by Rule 36 Duluth's IRTS programs and subjected them to the

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[20] *See*, J. Anderson Dep. at 95; Dep. Ex. 19; J. Bradley Dep., Ex. A-14 at 3.
[21] County contracts are required by the IRTS statute before a provider can become licensed and can begin to operate. Minn. Stat. § 256B.0622, subd. 4(a)(1) (2008).
[22] J. Bradley Dep. Exs. A-15, A-17, A-18. *See*, DHS Memorandum at 15-16. The only 2006 county contract with Rule 36 Duluth that lacks an explicit provision providing for the retroactive adjustment of rates is the Washington County contract. See, J. Bradley Dep. Ex. A-16.
[23] J. Bradley Dep., Ex. A-14 at 3 (emphasis added).
[24] J. Anderson Dep. at 169-172.
[25] Aff. of R. Minkema at ¶¶ 8-11; J. Anderson Aff. at ¶ 23.

DHS developed rate criteria and federal procurement accounting standards to determine whether they were reasonable and allowable.[26] In the end, the report disallowed costs incurred by Rule 36 Duluth not only in the central office but in the IRTS homes as well.[27] In total, DHS's Internal Audit Division disallowed $695,747 of Rule 36 Duluth's actual costs for calendar year 2006.

In 2009, the payment provisions under Minn. Stat. § 256B.0622, subd. 8, were amended to permit adjustments to the approved rate based on actual costs.[28] The amendment also includes references to "allowable, allocable, and reasonable costs" that are consistent with federal procurement requirements.[29] However, the amendment expressly states that these provisions do not govern any IRTS contracts entered into before January 1, 2010.[30] It is undisputed that the IRTS services at issue in this appeal were provided under contract during calendar year 2006.

Summary Disposition Standards

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[31] The Office of Administrative Hearings has generally followed the summary judgment standards developed by state and federal courts when considering motions for summary disposition.[32] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[33]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[34] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[35] The evidence presented to defeat

[26] R. Gutz Dep at 39-44; J. Anderson Aff. at ¶ 13.
[27] Aff. of R. Minkema at ¶¶ 3, 7, 12-13.
[28] Minn. Stat. § 256B.0622, subd. 8a (2009).
[29] Minn. Stat. § 256B.0622, subds. 8(c)(2) (2009).
[30] Minn. Stat. § 256B.0622, subd. 8a(f) (2009).
[31] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.
[32] *See* Minn. R. 1400.6600.
[33] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[34] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[35] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

a summary judgment motion, however, need not be in a form that would be admissible at trial.[36]

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[37] All doubts and factual inferences must be resolved against the moving party.[38] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[39]

2006 IRTS Program Standards

Minnesota Statutes § 256B.0622 governs the Intensive Rehabilitative Mental Health Services program.

Under Minn. Stat. § 256B.0622, subd. 4 (2006), IRTS providers were required to have a contract with the host county to provide services and the Commissioner was required to "develop procedures for counties and providers to submit contracts and other documentation as needed . . . to determine whether the standards in this section are met."[40]

Minnesota Statutes § 256B.0622, subd. 8 (2006), provided as follows:

> Subd. 8. Medical assistance payment for intensive rehabilitative mental health services.
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> (a) Payment for residential and nonresidential services in this section shall be based on one daily rate per provider inclusive of the following services received by an eligible recipient in a given calendar day: all rehabilitative services under this section, staff travel time to provide rehabilitative services under this section, and nonresidential crisis stabilization services under section 256B.0624.
>
> (b) Except as indicated in paragraph (c), payment will not be made to more than one entity for each recipient for services provided under this section on a given day. If services under this section are provided by a team that includes staff from more than one entity, the team must determine how to distribute the payment among the members.
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> (c) The host county shall recommend to the commissioner one rate for each entity that will bill medical assistance for

[36] *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).
[37] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[38] *See*, *e.g.*, *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).
[39] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
[40] Minn. Stat. § 256B.0622, subd. 4(c) (2006).

residential services under this section and two rates for each nonresidential provider. The first nonresidential rate is for recipients who are not receiving residential services. The second nonresidential rate is for recipients who are temporarily receiving residential services and need continued contact with the nonresidential team to assure timely discharge from residential services. In developing these rates, the host county shall consider and document:

(1) the cost for similar services in the local trade area;

(2) actual costs incurred by entities providing the services;

(3) the intensity and frequency of services to be provided to each recipient;

(4) the degree to which recipients will receive services other than services under this section;

(5) the costs of other services that will be separately reimbursed; and

(6) input from the local planning process authorized by the adult mental health initiative under section 245.4661, regarding recipients' service needs.

(d) The rate for intensive rehabilitation mental health services must exclude room and board, as defined in section 256I.03, subdivision 6, and services not covered under this section, such as partial hospitalization, home care, and inpatient services. Physician services that are not separately billed may be included in the rate to the extent that a psychiatrist is a member of the treatment team. The county's recommendation shall specify the period for which the rate will be applicable, not to exceed two years.

(e) When services under this section are provided by an assertive community team, case management functions must be an integral part of the team.

(f) The rate for a provider must not exceed the rate charged by that provider for the same service to other payors.

(g) The commissioner shall approve or reject the county's rate recommendation, based on the commissioner's own analysis of the criteria in paragraph (c).

The Department has not adopted administrative rules to implement a rate setting function under the IRTS statute and there has been no mandate from the Legislature that it do so.[41]

Arguments of the Parties

Minnesota Statutes § 256B.0622 governs Medical Assistance payment for intensive rehabilitative mental health services. The 2006 version of the IRTS statute established a two-step process for setting the rate that each provider would bill Medical Assistance for residential services.[42] First, the counties, after considering the six statutory factors, would recommend to the Commissioner one daily rate per provider for the upcoming year. The Commissioner then approved or rejected the recommended rate based on the Commissioner's own analysis of the same six factors. The factors include the cost for similar services in the local trade area, the intensity and frequency of services to be provided, and the actual costs incurred by the entities providing the services. As enacted, the statute did not define or put limits on "actual costs."[43] It also made no reference to interim, conditional or settle-up rate-setting.[44] Nor in 2006 did the statute contain any provision authorizing audits or retroactive adjustments after a DHS audit finds non-allowable costs.[45]

Rule 36 Duluth contends that the statutory language is straight-forward and prospective. It directs the provider to submit its actual costs as one factor for consideration in setting future rates for services to be provided. The Appellant argues that by enforcing an annual retroactive settle-up to allowable costs and by retroactively revising IRTS rates, which were previously approved by the Commissioner, DHS has impermissibly enlarged the express powers delegated by Minn. Stat. § 256B.0622, subd. 8 (2006). Rule 36 Duluth also argues that retroactive adjustment of its IRTS payment rates should be reversed because DHS relied on unpromulgated rate-setting criteria. According to the Appellant, the DHS rate-setting guidelines and procedures meet the definition of rules under the Administrative Procedure Act in that they are agency statements of general applicability and future effect that make specific the law administered by the agency.[46] The Appellant asserts that DHS's retroactive settle-up rate-setting criteria and guidelines should not be given the force and effect of law because they were not duly promulgated through rulemaking.

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[41] *See*, Minn. Stat. § 256B.0622 (2009).
[42] Minn. Stat. § 256B.0622, subd. 8 (2006). In 2009, the payment provisions under Minn. Stat. § 256B.0622, subd. 8, were amended to permit adjustments to the approved rate based on actual costs. The amendment also includes references to "allowable, allocable, and reasonable costs" that are consistent with federal procurement requirements.
[43] *Compare*, Minn. Stat. § 256B.0622, subd. 8(c)(2) (2009).
[44] Minn. Stat. § 256B.0622, subd. 8 (2006).
[45] *Compare*, Minn. Stat. § 256B.0622, subd. 8a (2009).
[46] *See*, Minn. Stat. § 14.02, subd. 4.

DHS argues that Appellant's rates are subject to audit, retroactive adjustment and settle-up based on the language of the contracts entered into between the provider and the counties. DHS states that it determined settle-up rates were "the best way to implement the statutory directive that 'actual costs' be considered in determining rates."[47] It therefore requested counties to include provisions permitting retroactive rate adjustments in their contracts.[48] Because Rule 36 Duluth agreed to the contractual terms that permit retroactive adjustment of IRTS rates, DHS contends Rule 36 Duluth cannot now claim it was surprised that the Commissioner would in fact revise the rates.[49] DHS asserts that the challenged rates are not imposed by administrative fiat; they are contract rate structures agreed to by the affected parties. According to DHS, it is not seeking to enforce an unpromulgated rule but rather is asking Rule 36 Duluth to abide by the provisions of its county contracts, which establish an interim and settle-up rate structure. DHS maintains that there is nothing in the contracts that conflict with the IRTS statute, which is silent as to interim or settle-up rates. In the absence of a conflict with the requirements of the IRTS statute, DHS asserts counties and IRTS providers are free to contract for services on terms that are mutually acceptable.

Administrative agencies are creatures of statute and they have only those powers given to them by the legislature.[50] An agency's statutory authority may be either expressly stated in the legislation or implied from the expressed powers.[51] Whether an agency acts within its statutory authority is a question of law.[52] Generally, an administrative agency's jurisdiction is limited and entirely dependent upon the statute under which it operates.[53]

> Jurisdiction of an administrative agency consists of the powers granted it by statute. Lack of statutory power betokens lack of jurisdiction. It is therefore well settled that a determination of an administrative agency is void and subject to collateral attack where it is made either without statutory power or in excess thereof.[54]

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[47] DHS Memorandum at 23.
[48] *Id*. at 23-24.
[49] The Department concedes that Rule 36 Duluth's 2006 contract with Washington County does not contain a provision stating that the rates are subject to audit and retroactive change based on a review of the actual costs or expenses incurred by Rule 36 Duluth. *See*, DHS Memorandum at 14 and 17 at fn 11; Bradley Dep. Ex. A-16.
[50] *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969); *see also, In re Qwest Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005).
[51] *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985).
[52] *In re Qwest's Wholesale Service Quality Standards,* 702 N.W.2d 246, 259 (Minn. 2005), *citing, St. Otto's Home v. Minn. Dept. of Human Servs*., 437 N.W.2d 35, 39-40 (Minn. 1989).
[53] *Surf and Sand, Inc. v. Gardebring*, 457 N.W.2d 782, 785 (Minn. App. 1990), *rev. denied* (Minn. September 20, 1990).
[54] *McKee v. County of Ramsey*, 310 Minn. 192, 195, 245 N.W.2d 460, 462 (1976) (*quoting State ex rel. Spurck v. Civil Service Bd*., 226 Minn. 253, 259, 32 N.W.2d 583, 586 (1948)).

Agencies may not, under the guise of statutory interpretation, enlarge their powers beyond that which was contemplated by the legislative body.[55] Any doubt about the existence of an agency's authority will generally be resolved against the exercise of such authority.[56]

The IRTS statute in effect in 2006 did not grant DHS the authority to retroactively adjust a prior prospective rate proposed by a county and approved by DHS. Nowhere does the statute expressly state that the Commissioner or DHS may revise the negotiated rates, and the statute is devoid of any reference to audits, settle-up rate-setting, or retroactive adjustments based on non-allowable costs. The statute only directs the county and DHS to consider, among other factors, a provider's documented "actual costs" when recommending or approving a payment rate for future services.[57] Thus, the statute does not unambiguously grant DHS the authority to revise prior approved IRTS rates.[58]

The Department suggests that its authority to retroactively revise provider rates is implied by the language of Minn. Stat. § 256B.0622 as well as the Commissioner's broad authority to administer and monitor Minnesota's welfare programs.[59] According to the Department, the language in the statute directing the Commissioner to analyze a provider's "actual costs" when determining whether to approve a recommended rate gives DHS the implied authority to subsequently audit providers and impose settle-up rates based on criteria it developed defining allowable and non-allowable costs.[60] Mr. Anderson testified during his deposition that the Department could even require that providers obtain independent appraisals of their buildings so that the Department may "get at 'actual costs.'"[61]

Any enlargement of powers by implication must be "fairly drawn and fairly evident from the agency's objectives and powers expressly given by the legislature."[62] In this instance, the statute only directs the county and DHS to consider and analyze "actual costs" as one of six factors when determining a provider's prospective rate – the rate it "*will* bill medical assistance for residential

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[55] *Waller v. Powers Dept. Store*, 343 N.W.2d 655, 657 (Minn. 1984).
[56] *Qwest*, 702 N.W.2d at 259; *See also*, *Leisure Hills of Grand Rapids v. Levine*, 366 N.W.2d 302 (Minn. App. 1985), *rev. denied* (Minn. July 11, 1985) (court reversed dismissal of appeal because agency's 30 day appeal deadline exceeded statutory jurisdiction).
[57] Minn. Stat. § 256B.0622, subd. 8(c). The statute refers to the services "*to be* provided" and the rate each entity "*will* bill" for services.
[58] See*, Hubbard,* 778 N.W.2d at 320*, citing, Hirsch v. Bartley-Lindsay, Co*., 537 N.W.2d 480, 485-86 (Minn. 1995) (In determining whether an administrative agency has express statutory authority, the court analyzes whether the relevant statute unambiguously grants authority for an agency to act in the manner at issue.)
[59] Minn. Stat. § 256.01 (2008); DHS Memorandum at 3 and 12; J. Anderson Dep. at 95, 119, and 129-130.
[60] J. Anderson Dep. at 95, 119, and 129-130.
[61] J. Anderson Dep. at 119.
[62] *In re N. States Power Co*., 414 N.W.2d 383, 387 (Minn. 1987).

services."[63] The statute does not provide for audits, interim rates, or settle-up to actual costs. In addition, under the prior program, the negotiated provider rates were not subject to retroactive revision.[64] The Administrative Law Judge finds the Department's claim that such authority may be implied to be unpersuasive. Such an interpretation is at odds with both the plain language of the statute and the past practice of the Department.

Moreover, the Legislature has expressly granted retroactive rate-setting authority to DHS in other areas, such as with nursing home Medicaid payment rates.[65] The fact that the Legislature did not confer such retroactive settle-up authority on DHS by the IRTS enabling legislation suggests that the omission was intentional. But even if the omission was inadvertent, such authority may not be implied.[66]

The Administrative Law Judge concludes that by enforcing an annual retroactive settle-up to allowable costs and by revising previously-approved IRTS rates retroactively, DHS has impermissibly enlarged the express powers delineated in Minn. Stat. § 256B.0622, subd. 8 (2006).[67] Because DHS lacked statutory authority to retroactively reduce Rule 36 Duluth's pre-approved 2006 IRTS payment rate, its $695,747 disallowance is of no effect and should be reversed.

Even if the Department may, as it argues, expand its authority to include audits and rate adjustments by adding what the Legislature did not grant through language in contracts between the counties and providers, nothing in the contracts defines "actual costs" or the criteria DHS would employ to arrive at the adjusted settle-up rates.[68] For example, nowhere in the contracts does it provide a standard for reasonable or allowable costs and nowhere does it state that a provider's expenditures on lobbying, bad debt, or interest on loans will be disallowed. The best reading of "actual expenditures" is that a disbursement was made – not a disbursement that DHS favored or allowed.

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[63] Minn. Stat. § 256B.0622, subd. 8(c) (2006). One of the 6 factors is the intensity and frequency of services "*to be provided*." Minn. Stat. § 256B.0622, subd. 8(c)(3) (2006).

[64] *See, St. Otto's Home v. Minn. Dept. of Human Servs*., 437 N.W.2d 35, 40-41 (Minn. 1989) (Department's interpretation of amended rule unreasonable in light of past interpretation of similar language in previous version of rule.)

[65] See, Minn. Stat. § 256B.431, subd. 2d.

[66] *See, Wallace v. Comm'r of Taxation*, 289 Minn. 220, 184 N.W.2d 588, 594 (1971) (The Commissioner may not add what the Legislature either intentionally omitted or inadvertently overlooked.)

[67] *See, In re the Denial of Certification of Variance Granted to Hubbard*, 778 N.W.2d 313, 321 (Minn. 2010) (holding that DNR lacks express or implied authority to certify City of Lakeland's variance decision); *Malloy v. Comm'r of Human Services*, 657 N.W.2d 894, 896 (Minn. App. 2003) (holding statutory scheme did not contemplate commissioner's reversal of background study disqualification set-aside order.)

[68] *See*, J. Bradley Dep., Ex. A-14 at 3.

Given that a government agency was the sole drafter of the agreements, and the agreements are presented to providers as "contracts of adhesion," the ordinary rule is that ambiguities in contract terms are construed against the drafting agency.[69] In this case, the counties or DHS could have provided additional detail and criteria as to the types of expenditures considered reasonable and allowable. In the absence of such provisions, DHS may not retroactively reduce Rule 36 Duluth's rates based solely on its agreement to have its actual expenditures "reviewed." A contract provision requiring a regulated entity to produce either an "audit" or "review" is not the equivalent of a contractual consent to retroactively reduce a provider's rates based on the Department's own rate-setting guidelines.

The Administrative Law Judge finds also that the rate-setting guidelines DHS is attempting to enforce through the contracts between the counties and providers are unpromulgated rules and are entitled to no deference.

The Minnesota Administrative Procedure Act (MAPA) defines a rule as:

> every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[70]

Generally, an agency is not deemed to have engaged in rulemaking if its interpretation of a statute or rule coincides with the plain meaning of that statute or rule.[71] In other words, if an interpretation is consistent with the plain meaning of the statute or rule that is being interpreted, the agency action is authorized by the statute or rule itself, and the fact that no rule was adopted does not render the interpretation invalid.[72] However, if an agency's announced policy is inconsistent with the statute or rule, the courts have often invalidated that policy. Moreover, if the policy purports to make new law without the public input required by the APA, the policy will be invalidated.

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[69] *See, Benson v. City of Little Falls,* 379 N.W.2d 711, 713 (Minn. App. 1986) ("When a contract bears more than one reasonable interpretation, any ambiguity should generally be resolved against the party who drew the contract*"); accord, U.S. v. Standard Rice Co.,* 323 U.S. 106, 111 (1944) ("We will treat [the federal government] like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made"); *Corso v. Creighton University*, 731 F.2d 529, 533 (8th Cir. 1984) ("[w]here, as here, the contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party"); *Drainage Dist. No. 1 of Lincoln County, Neb., v. Rude*, 21 F.2d 257, 261 (8th Cir. 1927) ("[W]hen a written contract is entirely prepared by one of the parties, and accepted, as thus prepared, by the other, any doubt as to the meaning of its provisions is to be resolved against the party preparing it").

[70] Minn. Stat. § 14.02, subd. 4.

[71] *Flores v. Dept. of Jobs & Training*, 411 N.W.2d 499 (Minn. 1987) (unemployment compensation rule imposed additional requirements beyond those required by statute and was therefore inconsistent with the statute); *Cable Communications Board v. Nor-west Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984).

[72] *Sellner Manufacturing Co. v. Commissioner of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972).

Deference is given to an agency's interpretation of its own regulation, especially when the relevant language is unclear or susceptible to different interpretations.[73] If the regulation is ambiguous, the agency's interpretation will generally be upheld if it is reasonable.[74] No deference is given to an agency's interpretation, however, where the language of the regulation is clear and capable of understanding.[75] Moreover, if an interpretation has not been consistently applied in the past, a court may cite this as an important factor in finding the interpretation to be an invalid (unpromulgated) interpretive rule.[76] Interpretations by agencies that attempt to clarify the law they administer and are not within the plain meaning of an existing statute or rule are deemed to be interpretive rules. Interpretive rules must be adopted pursuant to the rulemaking requirements of the Minnesota APA in order to be valid.[77]

In this case, Mr. Anderson concedes that the rate-setting guidelines that he developed applied to all IRTS providers and were intended to clarify and make more specific the rate-setting provisions of Minn. Stat. § 256B.0622.[78] For example, the guidelines define "actual costs" to mean "costs that [are] allowable and allocable …" and adopt "unallowable costs" standards such as "Payments to a Related Party," "Interest on Loans Relating to Operating Capital," "Bad Debt," "Lobbying," and "over-earning."[79] The guidelines also adopt a five percent rate differential threshold for triggering the imposition of settle-up rates.[80] The statute, however, does not define "actual costs" and does not address overpayments or what costs are deemed unallowable. While agencies are permitted to apply statutory interpretations which merely restate or summarize existing law, DHS's guidelines in this instance are creating new requirements and restrictions and interpreting words that may be susceptible to more than one meaning. As such, the guidelines fall within the APA's definition of a rule and must be promulgated through the administrative rulemaking process in order to be valid and enforceable.

DHS asserts that it chose to use contracts to implement rate-setting in lieu of rulemaking in part because the county contracting standards were already in the statute and in part because of concerns regarding the time and expense of rulemaking.[81] Under other statutes and rules DHS has the express authority to require counties to include specific terms and language in their contracts. For example, Minn. Rule 9525.1870 provides that each contract for home and

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[73] *St. Otto's Home v. Minnesota Dept. of Human Services*, 437 N.W.2d 35, 40 (Minn. 1989).
[74] *Id*.; *Cable Communications Bd. v. Nor-West Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984).
[75] *Id*.
[76] *White Bear Lake Care Center, Inc. v. Minnesota Dept. of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982); *Wenzel v. Meeker County Welfare Bd*., 346 N.W.2d 680, 684 (Minn. App. 1984).
[77] *Dullard v. Minnesota Dept. of Human Services*, 529 N.W.2d 438, 445 (Minn. App. 1995), *citing, St*. *Otto's Home v. Minnesota Dept. of Human Services*, 437 N.W.2d 35, 42-43 (Minn. 1989).
[78] J. Anderson Dep. at 36-37 and 124-125.
[79] J. Anderson Dep. Ex. 26.
[80] J. Anderson Dep. at 130-134; Ex. 27.
[81] J. Anderson Aff. at ¶ 12; DHS Memorandum at 13-14.

community based waivered services include a detailed paragraph describing DHS's rights as a third party beneficiary. No such express authority to insert rate-setting provisions in county contracts exists here.

The Administrative Law Judge finds that the DHS rate-setting guidelines are interpretive rules which make specific the law enforced. In order to define actual allowable costs, DHS is required to amend the statute, which it did in 2009, or adopt rules. Because DHS's rate-setting guidelines were not promulgated under the APA, they are not entitled to deference and may not form the basis for adjustments to Rule 36 Duluth's 2006 IRTS rates and the resulting disallowance. For this reason, in addition to the lack of statutory authority and enforceable contractual provisions, the Administrative Law Judge recommends the $695,747 disallowance be reversed.

R.C.L.